



November 28, 2000

Mr. Therold I. Farmer
Walsh, Anderson, Brown Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2000-4551

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 141634.

The Pflugerville Independent School District (the "PISD") received a request for seven categories of information relating to employee grievances filed by three different employees, policies and procedures regarding employee grievances, and open records requests made by four named individuals. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Because your section 552.103 claim is the most inclusive, we will address it first. Section 552.103(a) excepts from disclosure

information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). PISD must meet both prongs of this test for information to be excepted under 552.103(a).

You state that the requestor has filed a complaint with the State Board of Educator Certification against the principal of a PISD school. Furthermore, you state that “[even] a cursory reading of the SBEC complaint substantiates the fact that [the principal] is a party ‘as a consequence of’ his ‘office or employment,’ as required by section 552.103.” However, it is unclear to us from the face of the complaint whether the principal is a party to the action as a result of his office or employment with PISD or as a result of his own individual violations of professional ethics rules. Furthermore, beyond your conclusory statement that the principal is a party as a consequence of his office or employment, you make no effort to demonstrate the capacity in which the principal is included in the complaint. Therefore, we must conclude that you have not met your burden in showing that section 552.103 of the Government Code applies to the requested information.

Next, you claim that employee evaluations contained within the responsive information are excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Under section 21.355 of the Education Code, “[a] document evaluating the performance of a teacher or administrator is confidential.” This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). A “teacher” for the purposes of section 21.355 “is a person who is required to hold and does in fact hold a teaching certificate under subchapter B of Chapter 21 or a school district teaching permit under section 21.355 of the Education Code, and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation.” Likewise, an “administrator” is a person who is required to hold and does in fact hold an administrator’s certificate under subchapter B of chapter 21, and who is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation.” Here, the employees who are the subjects of the requested evaluations held the following positions with the school: registrar, secretary, office/library assistant, teacher assistant, materials aide, and materials assistant. You do not indicate, nor does it appear from the submitted information, that any of the employee evaluations pertain to certified or permitted teachers or certified administrators as required by section 21.355. Therefore, we find section 21.355 of the Education Code does not apply to the evaluations included within the responsive information. Consequently, the evaluations are not excepted under section 552.101 of the Government Code.

You contend an audiotape of a PISD Board of Trustee closed meeting concerning one of the employee grievances is excepted from disclosure under section 552.101 of the Government Code. Section 551.104 of the Government Code, a provision of the Open Meetings Act, makes the tape of a properly closed meeting confidential. An audiotape recording of a closed meeting is available for public inspection and copying only under a court order. Gov’t Code § 551.104; Open Records Decision No. 495 at 4 (1988) (audiotape recordings of closed

meetings are confidential unless court rules otherwise).¹ Furthermore, section 551.146 provides that it is a criminal offense to disclose to a member of the public an audiotape recording of a closed meeting. Thus, section 551.104, in conjunction with section 552.101, protects from public disclosure an audiotape recording of a properly closed meeting held under the Open Meetings Act. We agree that the audiotape recording of the PISD Board's closed meeting is confidential by law. Accordingly, you must withhold the audiotape under section 552.101 as information deemed confidential by law.

You also claim that the following information is confidential and therefore excepted from disclosure under section 552.101: medical information and reasons for sick leave, medical leave, and temporary disability leave; employee payroll deductions for medical or financial purposes; I-9 forms; and federal income tax records. However, we are unable to find any of this information in the submitted documents. Likewise, while you contend that grades and other information on college transcripts are excepted from disclosure under section 552.102(b), we are unable to find any such information in the submitted documents.

You further argue that to the extent the responsive information contains highly embarrassing facts about PISD employees, the information should be excepted from disclosure under section 552.102 of the Government Code. Under section 552.102, information is excepted from disclosure "if it is information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative." The protection of section 552.102 is the same as that of the common law right to privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Information may be withheld from the public under the common law right of privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). We have marked the information in the employee's grievance file that must be withheld under the common law right of privacy and section 552.102. *See Indus. Found.*, 540 S.W.2d at 685; Open Records Decision No. 611 at 1; *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied).

You further contend that "[t]o the extent that any of the records found in [PISD's] files that are responsive to the request contain correspondence between PISD and its attorney..., [PISD] asserts this relevant exception under section 552.107." Section 552.107(1) excepts

¹However, records that were discussed in a closed meeting and records created in a closed meeting, other than a certified agenda or tape recording, are not made confidential by chapter 551 of the Government Code. Open Records Decision No. 605 (1992).

from disclosure information “that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.” This exception does not apply to all client information held by a governmental body’s attorney; rather, it excepts from public disclosure only “privileged information,” i.e., communications made to the attorney in confidence and in furtherance of rendering professional services or that reveal the attorney’s legal opinion or advice. Open Records Decision Nos. 589 at 1(1991), 574 at 3 (1990), 462 at 9-11(1987). Here, not only do you fail to indicate which information you believe is protected under section 552.107, you fail to explain how any information constitutes privileged information for purposes of section 552.107. Therefore, we find that you have failed to meet your burden under section 552.107, and may not withhold any information under this exception. *See* Open Records Decision No. 589 (1991) (governmental body must identify portions of information it claims is subject to the attorney-client privilege).

Likewise, you argue that the work product of PISD’s legal counsel is excepted from disclosure under section 552.107. We note that section 552.111, and not section 552.107, is the appropriate exception under the Act for an assertion of the attorney work product privilege. *See* Open Records Decision No. 647 (1996). Therefore, we consider your assertion of attorney work product under section 552.111. You also assert under section 552.111 that the responsive information is excepted “[t]o the extent that any of the records found in [PISD’s] files that are responsive to the various requests ... constitute intra-agency memoranda that are sufficiently policy related and contain advice, opinion, or recommendation.” Section 552.111 of the Government Code excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity’s policymaking process. Open Records Decision No. 615 at 5 (1993). With respect to attorney work product, a governmental body may withhold such information from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney’s mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). Again, you have failed to identify which documents you believe are excepted and have failed to explain how the exception applies. Therefore, we find you have failed to meet your burden under section 552.111 and may not withhold any requested information under that exception.

Finally, you argue that employee social security numbers contained within the responsive information are excepted from disclosure under section 552.024. Section 552.117 excepts from public disclosure information relating to not only the social security number, but also the home address and home telephone number of a current or former government employee, as well as information revealing whether the employee has family members. Section 552.117 requires you to withhold this information if a current or former employee requested that this information be kept confidential under section 552.024. *See* Open

Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Therefore, to the extent the employees requested that their information be kept confidential before the request for information was made, you must withhold the information. We note that in this instance, the requestor's own social security number, address, phone, and family member information are included in the requested documents. Section 552.023(a) grants a special right of access to a person or a person's authorized representative to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests. *See* Open Records Decision No. 481 (1987) (determining that common law privacy does not provide basis for withholding information from its subject). Therefore, in this instance, because the requestor, the representative of a former employee, is in part asking for his client's own information, he has a special right of access to the information that normally would be excepted from public disclosure under section 552.117. We have marked the information regarding the remaining employees that may be subject to the section 552.117 exception if the employees elected nondisclosure under section 552.024.

We also note that the submitted documents contain information considered confidential under section 552.114 of the Government Code and the Family Educational Rights and Privacy Act of 1974 ("FERPA"). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public

disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." See Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the types of information that may reveal or tend to reveal information about a student that must be withheld pursuant to FERPA.

In summary, you must withhold the audio tape of the PISD board's closed meeting concerning an employee grievance under section 552.101. You must also withhold certain marked information under the common law right of privacy and section 552.102 of the Government Code as well as certain marked student identifying information under FERPA and section 552.114. Furthermore, to the extent the requested documents contain the home address, home telephone, social security number, and family member information of current or former employees who elected to keep this information confidential before the request for information was made, you must withhold this information under sections 552.117 and 552.024, with the exception of the information pertaining to the requestor's client. However, the remainder of the requested information is subject to disclosure and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

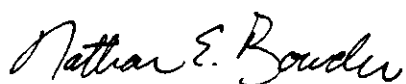
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB\er

Ref: ID# 141634

Encl: Submitted documents & audio tape

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(w/o enclosures)